SUPREME COURT, U.S.
MAY 29 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Terms 1967

No. ~~1134~~ 203

EUGENE ELLSWORTH AYOTTE,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

GERALD M. FRANKLIN,
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3103 Cadillac Tower,
Detroit, Michigan 46228

THE INLAND PRESS, DETROIT, MICHIGAN

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Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

A writ of certiorari is respectfully sought to review the Court of Appeals' order denying to petitioner the setting aside of a order entered March 2nd, 1967, sustaining the criminal conviction of the petition.

OPINIONS BELOW

The basic decision involved in this application is the order on motion to disqualify entered by Chief Judge Weick on January 19, 1967 and is printed in Appendix A hereto, infra, Page 8.

This order was entered after a motion for removal of Judge George Edwards for prejudice was filed on January 4, 1967 and is printed in Appendix B, hereto, infra, Page 14.

This motion was filed after the case was argued and submitted on December 8, 1966 before Justices Edwards, Celebrezze, and Cecil.

An answer in opposition to motion for disqualification of the Honorable George Edwards for prejudice was filed by the government on January 20, 1967 and is printed in Appendix B, hereto, infra, Page 15.

One day after the Order on Motion to disqualify was entered on January 19, 1967 a order was entered by Judge George Edwards to excuse him from any further consideration in the appeal and is printed in Appendix A, hereto, infra, Page 10.

The opinion affirming the Judgment of the District Court was entered March 2, 1967 and is set forth in Appendix A, infra, Page 13.

The Petitioner moved to set aside the order affirming the Judgment of the District Court and to reassign the Appeal for Rehearing on March 15, 1967, and is printed in Appendix B, hereto, infra, Page 18.

April 6, 1967 an order was filed denying a motion for rehearing, and is set forth in Appendix A, infra, Page 10.

Thereafter Justice Potter Stewart after a petition was filed to extend time for filing writ of Certiorari; extended time to file petition to and including May 27, 1967, and is printed in Appendix A, hereto, infra, Page 13.

JURISDICTION

The Court's jurisdiction is involved under Rule 37(b) of the Federal Rules of Criminal Procedure, 28. U.S. Code No. 1254 (i), and 28 U.S. Code No. 2106, since the proceeding before the Court of Appeals have so far departed from the accepted and usual course of judicial proceedings that they have infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United Stafes, as to call for an exercise of this Court's power of supervision.

QUESTION PRESENTED

Where petitioners appeal from a criminal conviction is argued before a panel of 3 Circuit Judges of the Sixth Circuit Court of Appeals and thereafter reasons come to light causing an affidavit of prejudice to be filed against one of the justices to remove him from the case, only to be answered by an order setting forth that the matters complained in the motion were actually brought to light at the time of the hearing; which order is wholly untrue as shown by Sworn Affidavit printed in Appendix C, hereto, infra, Page 24; has the judicial atmosphere thus been so permiated by doubts of fairness and impartiality so as to deprive the petitioner of a fair and impartial review of his appeal?

STATEMENT

The Petitioner was along with three other individuals tried before the District Court of the United States for the Eastern District of Michigan, Southern Division for Criminal Conspiracy to violate the National Bankrupcy Act Section 371, Title 18 U.S. Code.

A jury trial was commenced on May 18, 1965 and ended on June 4, 1965, when the jury convicted all defendants as charged.

The Petitioner thereafter Appealed his conviction to the United States Court of Appeals for the Sixth Circuit, filed his Brief and Appendix setting forth therein four Questions wherein allegations of reversible error were presented for review.

On December 8, 1966, Gerald M. Franklin of Detroit, Michigan, attorney for petitioner argued the cause before Justices Edwards, Celebrezze and Cecil.

The only matters put forth by the justices pertained to the Questions asked to be reviewed. Judge Edwards asked one or two questions directed only at matters presented on Appeal.

A few weeks after the case was Argued and Submitted, attorney for petitioner herein while talking to a reporter from a local Detroit Newspaper was informed by him that Justice Edwards while Police Commissioner for the City of Detroit had conducted investigations of the Petitioner and certain of his associates with whom Petitioner was also under indictment in another matter.

Investigation of the Newspaper Morgue verified what the reporter related and compelled Attorney for Petitioner herein to File a Motion for Removal of Judge George Edwards for Prejudice, (App. B, Page 14.)

Chief Judge Weick who had no personal knowledge of the hearing or Oral Argument Filed an Order on Jan. 19, 1967, (App. A. P. 8), that completely and utterly flabergasted petioner's attorney stating:

> "When the case was called for oral argument in this Court, the Judge announced in Open Court that he had been Police Commissioner of Detroit at the time of the commission of at least some of the acts which are the subject of this Appeal and he offered to excuse himself, but Counsel for Appellant, who is the same Counsel who signed the Motion to Disqualify then stated that he had no objection to the Judge's sitting."

Attorney for Petitioner has filed an affidavit under oath (App. C, P. 24,) stating upon his standing as an attorney before this court and as a person not effected by mental disease that the Order of Chief Judge Weick is wholly false.

The answer in opposition to the Motion to Disqualify filed by the government (App. B, P. 15, makes no mention of statements made by Judge Edwards during oral argument althongh the same Assistant United States Attorney, Joel M. Shere who prepared and signed the answer was the same United States attorney who argued the case on December 8, 1966.

After an order was entered on March 2, 1967 by Circuit Judges Celebrezze and Cecil affirming the Judgment of the District Court, (App. A, P. 10.) A motion to set aside the Order Affirming and to reassign the entire appeal for a rehearing before three different Circuit Judges was filed on behalf of petitioner, (App. B, P. 18-20.) This was denied by order of Judges Celebrezze and Ceil on April 6, 1967, (App. A, P. 13) without even presenting the motion and affidavit in support thereof to Chief Judge Weick for determination.

REASONS FOR GRANTING THE WRIT

The guarantee of a fair and impartial trial or hearing has been woven into our system of jurisprudence since King John signed the Magna Carta after the battle of Runnymede.

Our own Constitution has guaranteed this right of a fair and impartial trial in Article Sixth of the Amendments, and has been the subject of court supported decision (*High* v. *Redman*, 128 Atlantic, 2d 187). This right is so self evident that an attorney who would allow a Judge to sit in judgment upon his client, who had been Police Commissioner in the city at the time and place where the indictment sets forth the crime had been committed would be either guilty himself of wrongdoing or so stupid that his qualifications to appear before the Bar of any court should be seriously questioned.

Although against the apparent insurmountable stature of the entire Sixth Circuit Court of Appeals the affidavit of Respondent's attorney (App. C, P. 24) standing alone might not appear as convincing and compelling to this

court, there are some supporting arguments that it is hoped will convince this tribunal to grant the writ.

First it would seem logical that the United States District Attorney would in his answer have set forth the matters contained in Judge Weick's Order, if it was so, this he did not do.

Second the letter of April 7, 1967 to the Clerk of Court, (App. C, P. 23, and his answer thereto of April 10, 1967), (App. C, P. 23), should demonstrate to this court that Attorney for Respondent up until that time believed he would be entirely supported by a written transcript.

Lastly, unless Attorney for Respondent is some kind of demented screw ball there was absolutely no logic in filing the Motion to remove Justice Edwards as he did (App. B, P. 14.) If the matters set forth in Judge Weick's Order in truth had taken place.

CONCLUSION

It is clear beyond reasonable dispute that if the second to the highest court of the land has provided an Appellant a review in anything but a fair and impartial atmosphere that they have deprived him of his constitutional rights guaranteed to all citizens regardless of race, creed or religion, it is submitted that if any doubt exists as to whether or not the Petitioner was given a fair and impartial hearing before the Court of Appeals, that the doubt must be resolved in favor of the Petitioner and the writ granted in an exercise of this court's power of supervision.

Respectfully submitted,
Gerald M. Franklin

APPENDIX A

ORDER ON MOTION TO DISQUALIFY

WEICK, Chief Judge. Although nearly a month has elapsed since this appeal was argued orally before a panel of this Court, the appellant has now filed a motion to disqualify one of its three members. The grounds of the motion are that at the time of the commission of the offenses involved in the appeal, which were violations of the National Bankruptcy Act, the Judge was Police Commissioner of Detroit; that he had caused investigations to be made of appellant and his associates by the Detroit Police Department and appeared before a Senate Sub-Committee and made statements to the effect that appellant and his associates were members of the Mafia. The motion does not state the subject of the investigations by the Detroit Police Deparment, but presumably it was not for violations of federal law.

When the case was called for oral argument in this Court, the Judge announced in open court that he had been Police Commissioner of Detroit at the time of the commission of at least some of the acts which are the subject of this appeal, and he offered to recuse himself, but counsel for appellant, who is the same counsel who signed the motion to disqualify, then stated that he had no objection to the Judge's sitting.

Moreover, the motion does not even assert that the appellant, or his counsel, at the time of the oral argument had no knowledge of all of these matters of which he now complains. There is no certificate of counsel that the motion is made in good faith.

Where a litigant desires to question the qualifications of a judge to sit in a case, he must make timely objection thereto; otherwise it is deemed waived. *Adams* v. *United States,* 302 F.2d 307 (5th Cir. 1962); *Ramirez* v. *United States,* 294 F.2d 277 (9th Cir. 1961); *Neil* v. *United States,* 205 F.2d 121 (9th Cir. 1953).

In the present case, not only was the objection untimely made, but there was also an express waiver when counsel for appellant stated in open court that he had no objection.

Furthermore, the statute dealing with disqualification of judges has no application to this case. 28 U.S.C. § 455. It is not claimed that the judge had any financial, beneficial or any other kind of interest in this case, or that he is related or connected with any party or his attorney, so as to render it improper for him to serve. *Cf. United States* v. *Bell,* 351 F.2d 868, 877, 878 (6th Cir. 1965).

The motion to disqualify is denied.

Enter:

Paul C. Weick

Chief Judge

ORDER

Treating defendant-appellant's motion to disqualify the undersigned as a withdrawal of a clear waiver (entered in open court) of any objection to my participating in the hearing and the decision of the above-styled case;

And basing this action solely on the fact previously stated by me at said hearing (the sole fact of any possible significance known to me) that during some of the events involved in this case I was Police Commissioner of the City of Detroit.

I hereby recuse myself from any further consideration of or participation in said appeal.

George Edwards
Circuit Judge

ORDER

Before: EDWARDS* and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

On a two-count indictment, Eugene Ellsworth Ayotte, Defendant-Appellant, was charged and found guilty of conspiring to violate the National Bankruptcy Act (18 U.S.C., Section 152), and of violating the substantive provision of the Act, namely, transferring and concealing of assets in contemplation of bankruptcy. The charges against Appellant and others grew out of his operation of the Grosse Pointe Jewelry Store. This store, along with another business, was operated by Appellant under the name

*Judge Edwards recused himself and did not participate in the decision of this case.

of Louis Beatrice. Appellant had previously operated the Palm Furniture Company store under the name of Henry Oliver. The evidence disclosed that Appellant, and others associated with him, fraudulently obtained Jewelry supplies by furnishing false financial statements. Appellant failed to pay his creditors for the jewelry supplies, and after appropriating most of the merchandise, let the jewelry store fall into bankruptcy.

Appellant's objection to the introduction of aliases used by him is without merit. Such evidence dealt directly with the charge that Appellant intended to defraud persons with whom he dealt.

Appellant objects to comments and testimony relating to his involvement in the bankruptcy of the Palm Furniture Company. The Government made no mention of criminal prosecutions resulting from the bankruptcy of the Palm Furniture Company. The evidence of the Palm Furniture Company bankruptcy was proper to show the scheme of the Appellant, and to prove the necessary criminal intent or guilty knowledge. *Kowalchuk* v. *United States,* 176 F.2d 873 (C.A. 6, 1949). We find no merit to Appellant's contention that a deliberate effort was made to get a prior criminal record before the jury.

Finally, Appellant maintains that in its final argument the Government disclosed to the jury that Appellant refused to indicate where the books and records of the business were. Appellant maintains this was prejudicial error because it placed Appellant under the necessity of asserting his privilege against furnishing incriminating documents against himself. This final contention is likewise without merit. 18 U.S.C., Section 152 provides, in part, as follows:

> "Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt." (shall be guilty of an offense).

Appellant did not object to the statement made by the Government's attorney. The Trial Judge charged the jury, in part, as follows:

> "The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence."

> "The law does not compel a defendant to take the witness stand and testify and no presumption of guilt may be raised and no inferences, regardless of what I said previously about inferences, of any kind, may be drawn from the failure of a defendant to testify."

Finding no prejudicial error, and finding substantial and competent evidence to support the conviction of the Appellant, it is Ordered that the Judgment of the District Court be, and it is, hereby affirmed.

ENTERED BY ORDER OF THE COURT

Carl W. Reuss
Clerk

ORDER

Before: CELEBREZZE, Circuit Judge, and CECIL, Senior Circuit Judge.

This cause is before the Court on Defendant-Appellant's motion to set aside the order affirming the judgment of the District Court and to re-assign the appeal for rehearing.

Upon consideration, it is ORDERED that the motion to set aside the order affirming the judgment of the District Court and to re-assign the appeal for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

Carl W. Reuss

Clerk

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 27, 1967.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

Dated this 1st day of May, 1967

APPENDIX B

MOTION FOR REMOVAL OF JUDGE GEORGE EDWARDS FOR PREJUDICE

NOW COMES the above named Defendant, EUGENE ELLSWORTH AYOTTE, by and through his attorney, Gerald M. Franklin, and hereby moves this Court to disqualify Justice George Edwards from deciding the case presently on appeal before this Court for the following reasons:

1. That at the time of the alleged commission of bankruptcy frauds, at the Palms Furniture Company, and the Grosse Pointe Jewelry Company, Justice George Edwards was Police Commissioner in the City of Detroit, Wayne County, Michigan.

2. That as Police Commissioner, Justice George Edwards had caused investigations to be conducted by the Detroit Police Department of Mr. Eugene Ellsworth Ayotte, the Appellant herein, as well as certain other individuals who were associated with Mr. Ayotte.

3. That further, Justice, George Edwards did before a Senate Sub-Committee and thereafter did make public statements that the associates of the Appellant were members of a secret crime organization, referred to by Justice Edwards as the Mafia, and further did personally say of the Defendant-Appellant, that he was a Lieutenant in the Mafia, which statements were uttered in public, and can be proven and substantiated.

4. That because of the matters herein set forth, and the fact that Justice George Edwards had knowledge of both the Appellant and his associates, had conducted investigations concerning them, and spoke disparagingly about them.

There is no way possible that the Defendant, Eugene Ellsworth Ayotte can receive a fair and impartial hearing on his appeal by Justice George Edwards, and for the reasons herein set forth the Defendant-Appellant hereby asks that Justice George Edwards be disqualified from hearing this appeal or partaking in the opinion relative to this matter.

By: Gerald M. Franklin
Attorney for Defendant-Appellant
3103 Cadillac Tower
Detroit, Michigan
WOodward 1-7766

ANSWER IN OPPOSITION TO MOTION FOR DISQUALIFICATION OF THE HONORABLE GEORGE EDWARDS FOR PREJUDICE

EUGENE ELLSWORTH AYOTTE, Defendant-Appellant, has filed with the Court a motion to disqualify the Honorable George Edwards from hearing the instant appeal and participating in its decision. In his motion Appellant makes the following charges:

1) That Judge Edwards was Police Commissioner in the city of Detroit during the alleged commission of bankruptcy frauds by the Appellant and others growing out of their activities at the Palm Furniture Company, Detroit, Michigan, (presently on appeal before this Court in *United State* vs. *Ayote, et al.*, No. 17,080) and the Grosse Pointe Jewelry Store, Grosse Pointe, Michigan, out of which the present appeal arose;

2) That as Police Commissioner Judge Edwards caused the Detroit Police Department to investigate the Appellant and certain other indiyiduals associated with the Appellant:

3) That Judge Edwards did before a Senate subcomittee and on other occasions publicly state that the Appellant was a lieutenant in the Mafia and that associates of the Appellant were members of the Mafia.

On the basis of the foregoing Appellant moves that the Honorable George Edwards be disqualified because of prejudice against the Appellant from hearing the instant appeal and participating in its decision.

The UNITED STATES OF AMERICA, Plaintiff-Appellee, by LAWRENCE GUBOW, United States Attorney, and JOEL M. SHERE, Assistant United States Attorney for the Eastern District of Michigan, makes the following responses to Appellant's charges:

1) That Judge Edwards was Police Commissioner for the city of Detroit during a portion of the periods for which the Appellant and others were charged by indictment with federal bankruptcy fraud growing out of their activities at the Palm Furniture Company, Indictment No. 39666; and the Grosse Pointe Jewelry Store, Indictment No. 40918;

2) Appellee is without knowledge or information as to whether the Honorable George Edwards as Police Commissioner caused the Detroit Police Department to investigate the activities of the Appellant or any of his known associates;

3) On October 10 and 11, 1963 the Honorable George Edwards as Police Commissioner for the city of De-

troit testified before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, concerning the problem of organized crime in the city of Detroit and its environs. After a thorough reading of the transcript of Judge Edwards' testimony before the said subcommittee Appellee denies that Judge Edwards made any reference whatsoever to the Appellant during his testimony before the said subcommittee — let alone refer to him, as Appellant charges, as a lieutenant in the Mafia.

Appellant's motion to disqualify the Honorable George Edwards from *hearing* the instant appeal is absurd since the present motion was filed *after* (January 4, 1967) the Court including Judge Edwards heard the case on December 8, 1966. Furthermore, the motion to disqualify Judge Edwards from participating in the decision of this case is equally without merit as it is based upon nothing more than unsupported and, with respect to Judge Edwards' testimony before the Senate subcommittee, false accusations that Judge Edwards has spoken prejudicially of the Appellant and that he could not decide this case in a fair and impartial manner.

WHEREFORE, Plaintiff-Appellee respectfully submits that the instant motion should be denied.

LAWRENCE GUBOW
United States Attorney

By: /s/ JOEL M. SHERE
Assistant United States Attorney

Dated: January 19, 1967

MOTION TO SET ASIDE ORDER AFFIRMING JUDGMENT OF THE DISTRICT COURT AND TO REASSIGN APPEAL FOR REHEARING

NOW COMES the above named Defendant-Appellant, EUGENE ELLSWORTH AYOTTE, by and through his attorney, Gerald M. Franklin, and hereby moves this Court to vacate the Order entered affirming the Judgment of the District Court and reassign this Appeal to three (3) new Judges in the interest of justice in that these proceedings have so far departed from the accepted and usual course of judicial proceedings, as to have deprived the Defendant-Appellant of a fair and impartial hearing for the following reasons:

1. That on December 8, 1966, when the above captioned matter was called for oral argument at the Court of Appeals for the Sixth Circuit in Cincinnati, Gerald Franklin, attorney for the Defendant-Appellant, appeared before Justices Edwards, Celebrezze and Cecil. That the attorney for the Defendant-Appellant knew that Justice Edwards at one time had been a member of the Michigan Supreme Court and had also, at some time, been a police commissioner in Detroit, but had no knowledge as to exactly when or any other facts and circumstances surrounding Justice Edward's tenure as police commissioner.

2. That during the argument of the case on December 8, 1966, no mention was made by Judge Edwards, in open Court, that he had been commissioner of police in Detroit at the time of the commission of at least some of the acts which are the subject of this appeal.

3. That Gerald Franklin, attorney for the Defendant-Appellant herein, during a conversation with a reporter

from a Detroit newspaper, was advised by this reporter of the fact that he had done several articles involving Justice George Edwards and that the articles had disclosed that Justice Edwards not only was police commissioner in the City of Detroit at the time set forth that the alleged events occurred in the indictment but had himself, conducted an investigation surrounding the Defendant-Appellant as well as other associates of the Defendant-Appellant.

4. That thereupon, on January 8, 1967, a Motion was sent to the Federal Court of Appeals for the Sixth Circuit, asking that Justice George Edwards be removed, as certainly being prejudiced toward the Defendant-Appellant and having personal knowledge as well as having made statements concerning the Defendant-Appellant and his business associates while said Justice was police commissioner for the City of Detroit.

5. That thereafter, on January 19, 1967, an Order was entered in the United States Court of Appeals for the Sixth Circuit by Chief Judge Weick on the Motion to Disqualify; said Order, part of which reads as follows: "when the case was called for oral argument in this Court, the Judge announced in open Court that he had been police commissioner of Detroit at the time of the commission of at least some of the acts which are the subject of this appeal, and he offered to recuse himself, but counsel for Appellant, who was the same counsel who signed the Motion to Disqualify, then stated that he had no objection to the Judge's sitting."

That this supposed colloquy never occurred in open Court while the present attorney for Appellant was present during oral argument.

6. That one day atfer said Order on Motion to Disqualify was filed, an Order was entered on January 20, 1967 signed by Judge George Edwards that he had set forth all these matters at the hearing and he therefore recuses himself from any further consideration or participation in said appeal.

7. That because of the matters herein set forth, the Defendant-Appellant could not possibly receive a fair and impartial hearing on his appeal in that the entire atmosphere surrounding his appeal has been permeated with highly prejudicial and unjudicial matters.

WHEREFORE, Defendant-Appellant prays that this Court enter an Order setting aside the Order filed March 2, 1967, affirming the Judgment of the District Court and reassigning this matter for a full and complete rehearing.

This Motion is based upon the file and records in this cause and upon the Affidavit of Gerald M. Franklin, attorney for the Defendant-Appellant, which is hereto attached and made a part hereof.

GERALD M. FRANKLIN
Attorney for Defendant-Appellant
3103 Cadillac Tower
Detroit, Michigan 48226
WOodward 1-7766

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE ORDER AFFIRMING JUDGMENT OF THE DISTRICT COURT

State of Michigan,

County of Wayne—ss.

GERALD M. FRANKLIN, being first duly sworn, deposes and says that he is the attorney for the Defendant-Appellant, EUGENE ELLSWORTH AYOTTE, that he appeared for oral argument in Cincinnati before the United States Court of Appeals for the sixth Circuit on December 8, 1966, that the case was argued before Justices Edwards, Celebrezze and Cecil. To the best of your Deponent's recollection, at the time of oral argument in this cause, Justice Edwards at no time announced in open Court that he had been police commissioner of Detroit at the time of the commission of at least some of the acts, which are the subject of this appeal, nor did he offer to recuse himself.

That further, your Deponent further states upon oath that if such colloquy did occur and said facts brought to the attention of the Deponent herein, he most certainly would have asked that Justice Edward recuse himself at that time. However, in truth and fact, to the best of his knowledge and belief, he believes that this referred to discussion, as referred to in Judge Weick's Order of January 19, 1967, to the best of his knowledge and belief, never occurred and, in light of all the attending cirmumstances, he feels the Defendant-Appellant has been deprived of a fair and impartial hearing on his appeal.

GERALD M. FRANKLIN

Subscribed and sworn to before me
this ..... day of ....., 1967.

.....

NOTARY PUBLIC, Wayne County, Mich.
My commission expires:

APPENDIX C

April 7, 1967
Office of the Clerk
U.S. Court of Appeals
Cincinnati, Ohio 45202

Attention: Carl W. Reuss

Re: U.S.A.
vs.
Eugene Ellsworth Ayotte
No. 17,185

Gentlemen:

As a Writ of Certiorari, is being undertaken to the U.S. Supreme Court in the above matter, and said grounds of appeal are contained in part in the proceedings had on oral argument before the Court of Appeals on December 8, 1966, I would like to order a copy of the transcript of the oral argument had at that time.

Please advise the cost and the approximate length of time it will take to receive the transcript.

I will forward you my check by return mail for the full amount.

Kindly give this matter your prompt attention.

Very truly yours,
LAW OFFICE OF
FRANKLIN & HARRIS
Gerald M. Franklin

April 10, 1967

Mr. Gerald M. Franklin
Franklin & Harris
3103 Cadillac Tower

Re: United States of America vs.
Eugene Ellsworth Ayotte
No. 17,185

Dear Sir:

In reply to your letter of April 7, please be advised that there is no transcript available of the oral argument in this Court on December 8, 1966. This Court does not employ a Court Reporter and oral arguments are never reported and transcribed unless the parties make private arrangements in advance for the employment of a Court Reporter.

Yours very truly,
Carl W. Reuss, Clerk

State of Michigan,
County of Wayne—ss.

Gerald M. Franklin, first being duly sworn deposes and says that he is the attorney for the Petitioner Eugene Ellsworth Ayotte and files his affidavit with the express purpose of having the Writ of Certiorari granted.

December 8, 1966 I personally appeared before the Circuit Court of Appeals for the Sixth Circuit for oral argument after Briefs and Appendix had been filed from the Criminal conviction before the U.S. District Court for the Eastern District of Michigan, Southern Division.

Of the three judges who took the bench Edwards, Celebrezze and Cecil the only one known to me was Justice Edwards who I knew had at one time been a member of the Michigan Supreme Court and a former Police Commissioner in Detroit, however, I did not know during what periods of time.

After apologizing to the Court for being late as I was in the hall drinking coffee while they were waiting for me, I immediately started my argument. Questions were then asked by the bench which I answered to the best of my ability and then the U.S. Attorney gave his argument. Questions were again asked and answered and that ended the oral argument after a few closing remarks from myself in rebuttal.

A few weeks after returning to Detroit during a conversation with Mr. Herb Bolten a reporter for a local Detroit Newspaper it came to my attention that Jusice Edwards had been Police Commissioner at the time of the happen-

ings of the events leading to the indictment of Mr. Ayotte and further that it was a matter of much publicity, according to Mr. Bolten, in the local papers that Justice Edwards had investigated Mr. Mathew (Mike) Rubino who had been indicted along with Mr. Ayotte in another case had been continuously referred to in the transcript of proceedings in this trial as in the Palm Furniture Company Case.

I then had an investigation made of both newspaper morgues of the Detroit Free Press and Detroit News and was satisfied that what I was told was true. I was therefore convinced Justice Edwards never should have heard the case since he not only must have known my client, but have a preconceived opinion of him.

It was after this that I filed my motion of January 4, 1967 to remove Judge George Edwards for prejudice.

The rest is a matter of record. This affidavit is true and correct.

/s/ Gerald Franklin

Subscribed and Sworn

/s/ Michael M. Grand,
Notary Public, Wayne County, Mich.
Commission Expires: 10/1/68.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 203

EUGENE ELLSWORTH AYOTTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

Petitioner was convicted in the United States District Court for the Eastern District of Michigan of conspiracy to violate the bankruptcy laws in violation of 18 U.S.C. 371 and of concealing assets in violation of 18 U.S.C. 152. The court of appeals affirmed (Pet. App. A 10-12).

The sole question presented to this Court relates to the procedure on appeal. On December 8, 1966, oral

argument was heard in the United States Court of Appeals for the Sixth Circuit, before Judges Edwards, Cecil, and Celebrezze (R. 17).[1] When the case was called for argument, Judge Edwards revealed to the parties that he had been Police Commissioner of the City of Detroit at the time some of the acts involved in the indictment were committed and offered to recuse himself. Petitioner's counsel raised no objection at that time to having Judge Edwards hear and decide the case (R. 6-7, 12).

Approximately one month later, the same counsel moved to have Judge Edwards disqualified on the ground of prejudice. The motion stated that the judge was Police Commissioner of Detroit at the time of the commission of the offenses here involved; that as Police Commissioner he had caused an investigation of petitioner and some of his associates to be conducted; and that he had made certain statements concerning petitioner's connection with the Mafia (R. 3-4, 17-18).

Chief Judge Weick subsequently entered an order denying the motion. He stated that there was no showing that Judge Edwards had any substantial interest in the case, that the objection was not timely raised, and that there had been an express waiver of objection at the oral argument (R. 7-8; Pet. App. A 8-9). The same day, Judge Edwards recused himself from further participation in the case for the reason that he had been Police Commissioner at the

[1] "R." refers to the certified record filed with the Clerk of this Court; there is no transcript of the oral argument.

time some of the events of the case had occurred (R. 12; Pet. App. A 10). Three months after oral argument, the decision of the court affirming the conviction was announced, Judge Edwards not participating (R. 14). Motions to set aside the order affirming the conviction and to reassign the appeal for rehearing, based on the alleged bias of Judge Edwards, were denied (R. 22; Pet. App. A 13).

Petitioner's claim that the judicial atmosphere in the Sixth Circuit was tainted and thus deprived him of a fair and impartial review of his appeal is without foundation. It is difficult to perceive how a judge who did not participate in the decision of a case (although he did hear oral argument) could affect the decision-making of the two judges who did render the decision so as to deprive the petitioner of the right to a fair and impartial review. Nor is there any showing that Judge Edwards had any substantial interest in the case.[2] See *United States* v. *Bell*, 351 F. 2d 868 (C.A. 6), certiorari denied, 383 U.S. 947. The mere fact that a judge has had some contact with the defendant before him, by virtue of an office previously held, does not constitute grounds for disqualification on account of bias. See *Neil* v. *United States*, 205 F. 2d 121 (C.A. 9); *Adams* v. *United States*, 302 F. 2d 307 (C.A. 5).

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[2] Thus, as correctly concluded by Chief Judge Weick (Pet. App. A 9), the statute dealing with disqualification of federal judges, 28 U.S.C. 455, has no application here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JUNE 1967

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